

File No. MA 023-96

L. Kamerman)
Mining and Lands Commissioner)

Monday, the 14th day
of July, 1997.

THE MINING ACT

IN THE MATTER OF

Mining Claims S-1219959, 1219961 to 1219963, both inclusive, 1219965 and 1219967 to 1219972, both inclusive, situate in the Township of Chambers, in the Sudbury Mining Division, which have been restaked pursuant to subsection 48(8) of the **Mining Act** as Mining Claims S-1216377, 1206378, 1206370, 1220172, 1206371, 1219946, 1206369, 1206384, 1202752, 1219945 and 1219944, respectively, hereinafter referred to as the "Mining Claims";

AND IN THE MATTER OF

An application under section 105 of the **Mining Act** for payment of the outstanding balance of the contract for the staking of the original Mining Claims, or in the alternative, an application for the vesting of 60 percent ownership in the Mining Claims in the name of the Applicant;

AND IN THE MATTER OF

Ontario Regulation 7/96.

B E T W E E N:

CANADIAN GEMS AND MINERALS LTD.

Applicant

- and -

RAVEN RESOURCES INC.

Respondent

ORDER

UPON HEARING from the parties and reading the documentation filed;

1. THIS TRIBUNAL ORDERS that the application of Canadian Gems be allowed in part and that Raven Resources owes Canadian Gems a total of \$6,173.79 from which partial payment of \$5,000.00 has been deducted for a total of \$1,173.79.

.... 2

2. THIS TRIBUNAL FURTHER ORDERS that costs in this matter, awarded to Raven Resources, be fixed in the amount of \$1,500.00.

3. THIS TRIBUNAL FURTHER ORDERS that the amount owing by Canadian Gems be set off against the amount owing by Raven Resources, with the net result that Canadian Gems is ordered to pay to Raven Resources \$326.21 within 30 days of the date of this Order.

4. THIS TRIBUNAL FURTHER ORDERS that the notation "Pending Proceedings", which is on the abstracts of the Mining Claims to be effective from the 24th day of October, 1996, be removed from the abstracts of the Mining Claims.

5. THIS TRIBUNAL FURTHER ORDERS that the time during which the Mining Claims were pending before the tribunal, being the 24th day of October, 1996 to the 14th day of July, 1997, a total of 264 days, be excluded in computing time within in which work upon the Mining Claims is to be performed.

6. THIS TRIBUNAL FURTHER ORDERS that the 18th day of June, 1999, be fixed as the date by which the first two units of prescribed assessment work shall be performed and filed on the Mining Claims pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates shall be deemed to be June 18 pursuant to subsection 67(4) of the **Act**.

7. THIS TRIBUNAL DECLARES that all interest of Canadian Gems in the Mining Claims hereby ceases.

IT IS FURTHER DIRECTED that upon the payment of the required fees, this Order be filed in the Office of the Mining Recorder for the Sudbury Mining Division.

Reasons for this Order are attached.

DATED this 14th day of July, 1997.

Original signed by
L. Kamerman

L. Kamerman
Mining and Lands Commissioner

File No. MA 023-96

L. Kamerman)
Mining and Lands Commissioner)

Monday, the 14th day
of July, 1997.

THE MINING ACT

IN THE MATTER OF

Mining Claims S-1219959, 1219961 to 1219963, both inclusive, 1219965 and 1219967 to 1219972, both inclusive, situate in the Township of Chambers, in the Sudbury Mining Division, which have been restaked pursuant to subsection 48(8) of the **Mining Act** as Mining Claims S-1216377, 1206378, 1206370, 1220172, 1206371, 1219946, 1206369, 1206384, 1202752, 1219945 and 1219944, respectively, hereinafter referred to as the "Mining Claims";

AND IN THE MATTER OF

An application under section 105 of the **Mining Act** for payment of the outstanding balance of the contract for the staking of the original Mining Claims, or in the alternative, an application for the vesting of 60 percent ownership in the Mining Claims in the name of the Applicant;

AND IN THE MATTER OF

Ontario Regulation 7/96.

B E T W E E N:

CANADIAN GEMS AND MINERALS LTD.

Applicant

- and -

RAVEN RESOURCES INC.

Respondent

REASONS

This matter was heard on May 14, 1997 in the Larry Brown Room (formerly the Blue Room), of the Royal Canadian Legion, Kirkland Lake, Ontario. Thomas (Tom) O'Connor

....2

attended as a principle of Canadian Gems and Minerals Ltd. ("Canadian Gems") and was represented by Keith Cooper. Raven Resources Inc. ("Raven Resources") was represented by its President, Michael Leahy. Ann Black was listed in the Title of Proceedings as Party of the Third Part, but upon examination of the documentation, Ms. Black's name appears as one of the principals of Raven Resources, being the person who filed the Notice of Restaking of Transferred Claim. As such, there is no need for her to be added as a party in her personal capacity and her name has therefore been deleted from the Title of Proceedings.

Background

This application involves land in Chalmers Township which was initially staked during the lifting of the land caution in the Temagami area. Tom O'Connor, as a representative of Canadian Gems and former Mining Claims Inspector with the Ministry of Northern Development Mines, (MNDM) was retained Raven Resources to put together and supervise a team to stake as many mining claims as possible. After several days of staking, Mr. Leahy discharged Canadian Gems. The mining claims under this initial staking were recorded in the name of Raven Resources. Mr. Leahy subsequently ordered an inspection of the 22 units staked under the supervision of Mr. O'Connor and based upon what was found in the field, arranged to have the units restaked. These mining claims were subsequently recorded as the Mining Claims pursuant to subsection 48(8) of the **Mining Act**.

The application by Canadian Gems in this matter is for payment of the balance owed for the original staking, which Raven Resources has refused to pay, plus costs. In the alternative, Canadian Gems is seeking vesting of a 60 percent interest in the Mining Claims. Raven Resources has counterclaimed for return on the money it has paid, an amount of \$5,000, plus costs plus damages.

In the course of hearing evidence, it became apparent that the original staking by Canadian Gems was, by its own admission, not perfect. However, Mr. O'Connor maintained both at the time and at the hearing, that deficiencies were such that they could be rectified by a Mining Recorder's Order pursuant to subsection 110(6). Although the issue was not one of whether the originally staked mining claims could be recorded, the parties used the statutory provision for substantial compliance found in section 43 as the basis for whether money should be found owing or vesting of the Mining Claims should take place.

The crux of the application became whether the original 22 units were staked in substantial compliance with the requirements of the legislation. In this regard, Mr. Leahy sought to resurrect the cumulative defects doctrine found in cases up to 1989, notwithstanding the decision in **Ramsay v. Fernberg**, 7 M.C.C. 589 (Div. Ct.) and changes to the **Mining Act** expanding on the statutory provision of substantial compliance which became effective June 3, 1991.

The bulk of the concerns regarding the original staking raised by Mr. Leahy on behalf of Raven Resources involved, to some extent, a determination of whether Canadian Gem's staking was done in good faith, but more particularly focused on Mr. Leahy's belief that many of those claims were of such poor quality that they would be vulnerable to dispute. This differs considerably from the test found in clauses 43(2)(a) and (b) of whether "the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity" or whether "it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of [the **Mining Act**] and the regulations."

Issues:

1. Is the oral agreement for the staking of the units, having been made prior to staking, corroborated and therefore, in accordance with subsection 58(1) of the **Mining Act**?
2. Is the test of substantial compliance or deemed substantial compliance found in section 43 of the **Mining Act** a reasonable test to determine whether the agreement has been complied with, or whether there has been a breach or repudiation of the agreement?
3. Do any of the 22 units substantially comply with the requirements of the legislation, pursuant to subsection 43(1)? Of those remaining after answering the previous question, have any been staked with apparent good faith so as to be deemed to substantially comply with clause 43(2)(b)?
4. Should Canadian Gems be paid the balance of the price, based upon the contract? In the alternative, should Canadian Gems have vested in it a 60 percent interest in the Mining Claims?
5. If not, should Raven Resources be found entitled to have the partial payment of the contract price returned?
6. Should costs or damages be awarded to either party?

Opening Statements

Mr. Cooper summarized the facts set out above upon which this application is based. The applicant will be relying on the doctrine of substantial compliance in this application for payment of the balance or for the vesting of a 60 percent interest in the Mining Claims.

Mr. Leahy summarized his position and stated that the pre-meditated and intentional concoction of circumstances surrounding the staking, along with the making of false statements, were the basis of his refusal to pay the balance. It will be his position that the substantial compliance doctrine is overridden by the bad faith and deceit with which the staking of the units was undertaken.

Evidence

Thomas Andrew O'Connor was the only witness called on behalf of Canadian Gems.

William Bonney, an employee of the Elk Lake Community Forest, **Justin Robert Leati** and **Martin (Marty) Edward Thursten** being two of the stakers hired by Canadian Gems, **Ann Black** and **John David Michael (Mike) Leahy** were called to give evidence by Raven Resources.

Evidence was given generally on the retainer of Canadian Gems, on the staking by those employed by Canadian Gems, as well as the role of Mr. O'Connor as supervisor. This has been summarized with certain facts highlighted. Evidence was also heard on part of the independent inspection by William Bonney conducted after the staking. The issue of the quality of the restaking formed part of the case on behalf of Canadian Gems, and in the course of hearing evidence, there was a concession by Mr. Cooper that the Canadian Gems stakings were not perfect and in fact contained errors. This being the case, evidence was not heard from the second inspector from Elk Lake. Evidence of imperfections was not heard in detail due to the suggestion of the tribunal that this was not an issue. While several of the stakers on behalf of Canadian Gems did give evidence, particularly explaining the errors raised in the inspection evidence of Mr. Bonney, other errors were not raised specifically. Nonetheless, Mr. Leahy itemized each error in his final submissions.

The tribunal heard that Canadian Gems was retained just prior to the lifting of the caution. There was no agreement as to how many days prior Mr. O'Connor was contacted by Mr. Leahy and whether prior to Friday, September 13, 1996, there was anything other than a vague intention to engage Canadian Gems. Similarly, while the evidence between Mr. O'Connor and Mr. Leahy as to whether inexperienced stakers would be used, they disagreed on the quality of staking which Mr. O'Connor has agreed to supervise and Mr. Leahy agreed to accept.

The terms of the oral contract were agreed to, namely \$200 per day per man plus \$200 per unit staked were proposed. An additional \$400 was allowed for one day's setting up camp. Three of the stakers, Dan Joly, Justin Leati and David Deane had no staking or bush experience but the situation was nevertheless acceptable to the parties initially, owing to Mr. O'Connor's position as a former mining claims inspector, thus being in a position to ensure quality staking.

The staking team entered the area on Saturday, September 14, 1996 and set up camp. They encountered another group of stakers and with Mr. Leahy in the lead, an agreement was arrived at which would divide up the area so that they would not compete. Mr. O'Connor's role was described as that of field supervisor, in which he coordinated the staking and ensured the safety of his crew. Included in his activities were laying out ground prior to staking and the training of the stakers in the use of a compass and an axe. Target areas were selected on the map and men were sent into the bush to cut lines, mark posts and prepare lines for staking.

Mr. O'Connor described his activities. The day prior to opening he made his crew walk the areas they were going to stake, so that they would not get lost. His instructions included where to start and finish and what information was required on each post. He regarded as his role in the staking to warrant the work. In cross-examination, it was clarified that he did not consider himself lucky in the extent to which he had been able to lay out ground prior to staking. Also, Marty Thursten had been directed to show the fundamentals of staking to the crew. While Mr. Leahy gave the impression during cross-examination, that the days prior to staking, in addition to setting up camp, were for laying out claims, in fact, a great deal of this time was necessary to prepare the crew for heading out into the bush, so that concentration of time on the actual units to be staked did not take place. Mining Claims 1219961, 1219968 and units 1219959 which became confused with 1219960 were the only ones prepped prior to opening day.

- o When asked about the situation on the ground during staking, Mr. O'Connor stated that he spent opening day checking on his crew. His activities were further explained:
- o Justin Leaty staked Mining Claims 1219960, 1219968, 1219967 and 1219970 on opening day between the hours of 9 a.m. and 2:30 p.m., which involved the blazing of 7 complete lines, several partial lines and the making of several posts. Two of his claims had been prepped prior to opening day. Mr. O'Connor stated that Mr. Leaty had done his staking on his own, with the help of a boat man on the lake to ferry him across. Mr. O'Connor stated that he was present with Mr. Leaty on and off throughout the day and had to go to find him.
- o Dan Joly staked Mining Claim 1219961 on opening day, which according to the Application to Record (Ex. 5, Tab 1) took 21 minutes. Mr. O'Connor explained that Mr. Joly was so nervous in the bush alone, that he later assigned him with Marty Thursten, although not as a helper. He hoped that this situation would make Mr. Joly more comfortable with his surroundings.
- o Marty Thursten staked Mining Claim 1219962 on opening day, comprised of two units, having finished at 9:40 am. Mr. O'Connor could not explain what he and Mr. Joly did for the rest of the day, as he did not check up on them. His assumption was that they were looking for more open ground. He could not explain why adjoining lands which were available were not staked.

- o David Deane staked Mining Claim 1219969 on opening day, comprised of a half unit fraction, which he started at 9:30 and finished at 10:10 a.m. Mr. O'Connor said that he attended to Mr. Dean shortly after 9, when he noticed that Mr. Mintenna was staking Mining Claim 1223094 to the east and observed a gap between that claim and Mr. Thursten's Mining Claim 1219962. There had been a fourth claim which was prepped with pre-blazing and posts lying on the ground, but never was staked. Mr. O'Connor stated that he attended to Mr. Deane to ensure that he was in the right area. Mr. O'Connor did not follow Mr. Deane around the perimeter of his claim, but rather visited at every corner. He explained that all lines had already been made, except the south boundary, so after he ensured that Deane was on his way, Mr. O'Connor would leave to get a sense of what was going on in the area. For example, while Deane was doing his #2 post, Mr. O'Connor went down to find Mintenna's #3 post, then headed off to Thursten's #2 post, with Deane blazing along behind him. Mr. O'Connor volunteered that it was possibly more logical to secure the #2 with Thursten's #3, but he was anxious to ensure that even a fraction was staked. For the rest of the day, Mr. Deane operated the boat on Nellam Lake.

Mr. O'Connor could not give times at which he met up with his various stakers, as he was the coordinator and covered a lot of area in one day, including cedar swamp and hills, where he was concerned about his men.

- o On the second day of staking, Mr. Leaty remained in camp ensuring it was secure, having hurt himself the previous day. Mr. Joly staked Mining Claim 1219963, comprised of one unit, between 9 and 11 a.m. This staking was done by Mr. Joly alone, although Mr. O'Connor had sent Marty Thursten down with him. Mr. O'Connor did not visit them down there. Mr. Thursten was trying to stake a claim in the vicinity of Mr. Joly. However, he encountered problems when two helicopters dropped off 5 or 6 men each. Apparently Mr. Thursten encountered claim lines wherever he went, and was stymied for the entire day by what Mr. O'Connor described as a swarm of competitive stakers. The situation was described as pretty confusing, with a lot of dead end lines. Mr. O'Connor did not go there himself. However, only one claim was actually staked in the vicinity by others, located to the south of 1219963, and none were staked to the west. Mr.

O'Connor speculated as to whether there were "filed only" claims with the Mining Recorder, but stated that to his knowledge, these lands to the west remained open for several weeks.

Mr. O'Connor explained that Mr. Thursten had to do a lot of walking to attempt to figure what exactly was going on. Even as an inspector, it would have taken him two or three days to work out the orientation. However, their instructions had been that, should they encounter any adverse interest, they should abandon the area. Mr. Thursten was described as a seasoned staker. For him to spend the day and not be able to make sense of the area would be a waste of his time. As it was, he wasted part of the day.

- o That same day, Mr. Deane staked Mining Claim 1219971, comprised of six units, plus Mining Claim 1219972, working for eight hours. Mr. O'Connor stated that he carried only a machete, not an axe and did not assist Mr. Deane with posts or blazing. The only thing he did was mark the lines, using flagging tape so Deane wouldn't get lost.
- o On the third day, September 19, Messrs. Joly and Thursten worked together on Mining Claim 1219965, comprised of six units, although Mr. Joly is not listed on the Application to Record as a helper. However, according to the inspection conducted by Mr. Bonney, the dates on the posts for this claim indicate September 18th. Mr. O'Connor explained that Mr. Deane had never been in the bush before, and as his blazes were not up to snuff, he sent him back to touch them up on the 19th. Also, there were other problems with Deane's stakings. For example, O'Connor could not find the witness post for the #3 location, nor could he find the line, his main concern being that there was no overlap. All in all, Deane was in bad shape from his earlier hard work and it was not possible for him to participate. As he was exhausted, after touching up the south boundary, Deane was allowed to return to camp to heal.

During the course of September 19th, Mr. O'Connor stated that he was supervising the crew and not inspecting, making sure they were where they were supposed to be. He also went to the east to look for open ground. There was competition on the ground, and Mr. O'Connor stated that he was so busy that he had no lunch. This took the whole day, due to the fact that the competition laid a bunch of phoney lines to confuse matters and deter his crew.

Mr. Leahy pointed out that over the course of three days, a total of 17 hours and 11 minutes was spent in the bush by four men, with one man responsible for eight of those hours on two mining claims. Mr. O'Connor explained that he himself could stake 20 mining claims in a day, some in eight minutes. However, his crew did the best they could, and he took their word for everything that was put down. Mr. O'Connor reiterated that he was prepared to inspect and obtain the required order but never got the chance. Referring to the original discussion concerning staking, Mr. O'Connor stated that he could not warrant the stakings, as he never inspected them.

The issue of whether Mr. Leahy's crew used some of O'Connor's posts, which had been sprayed with three fluorescent "x's", was raised. The evidence of Mr. Bonney on this issue was that unused posts were found in the field, but no inscribed posts had been shaved and used, nor had any been removed from trees where they were found leaning.

Bill Bonney described his portion of the inspection:

- o Marty Thursten's first day claim 1219962, did not indicate am or pm on the times. The finish time on the # 1 post is identical to the time listed on the #4 post. There was minimal blazing between the #1 and #2 posts. The times on the posts did not make sense: #1 start 9:00; line post #1 9:08; #2 9:20; #3 9:15; Line Post #2 9:30; #4 9:40; finish #1 9:40.
- o On Joly's S-1219963, several of the posts did not have am or pm. At the # 3 post, Joly's name was misspelled as "Jolley". The finish time was shown on the #4 post as 10:30, even though the line between the #4 and #1 was blazed.
- o On Lehti's 1219967, there were 2 witness posts giving distances to the #2 post, on either side of Nellam Lake, which bisected the south boundary, notwithstanding that the #2 post itself was on land.
- o On Lehti's 1219970, the #3 post could not be located, despite searching. The start time on the #1 was 12 pm, the # 2 post time was 11:35 am. The south line appeared to split, avoiding an alder swamp in favour of easier ground. The blazed line followed the shore of Nellam Lake rather than running east to west. In attempting to locate the #3, Mr. Bonney did encounter the north line of 1219959.

- o On Deane's 1219971, the date on the Application to Record is shown as September 18th, but September 19 is shown on the #4 post. The first line post could not be found. A second witness post for the #2 post on the far shore could not be found. The second line post was in fact 1000 metres west, not the 800 metres shown, which he was able to discern through use of a hip chain. A start time is shown on the #1 post of 10:50 am, and also on the #4 post of 4 pm. Mr. Bonney made some reference to the fact that on September 19, the line post was not there, but he did see it there on the 24th, when he inspected. He suggested that the whole finish time is put in question.

Mr. Cooper commenced examining Mr. Bonney on his re-staking; the purpose of the examination being to show that no staking is perfect. After some discussion, Mr. Leahy was asked to concede that Mr. Bonney's staking was not perfect. Through discussions and the tribunal's position that the quality of re-staking is not in issue, it was conceded that while not perfect, the degree of problems as well as intent behind them was in issue in the Canadian Gems stakings.

Justin Lehti stated that he had no prior staking experience and his work in the bush was limited to favours for relatives. Camp for staking was set up on September 14. The following day, he participated in orientation such as the use of a compass, getting around in the bush and the like. No lines were prepared that day. Prepping of claims and blazing took place on the Monday. After looking at a map, it was determined who would stake which area, and then they went in to prepare posts and blaze trails. Prep work was only limited to one of Mr. Lehti's claims.

Mr. Lehti described his activities in staking the four Mining Claims on September 17. On his way to commencing 1219967, Mr. Lehti blazed from the #2 to #1 posts, and then commenced staking clockwise at the #1 post. In the process of staking 1219970, he hurt himself between the #2 and #3 posts and was assisted by Dean in erecting a witness post, even though Dean was not listed in the Application to Record. It was pointed out that on opening day, only the licensee could inscribe his own posts, to which Mr. Lehti replied that he was unsure what was allowed under the **Mining Act**, but he just wanted to get the job done. Under cross-examination, Mr. Lehti indicated that mistakes made were not intentional, that he did the best he could and in no way had any prior conflicts with Michael Leahy.

Mr. Thursten was uncertain as to the dates, except to say that he had been approached by Mr. O'Connor mid-September, and had gone into the bush three days before opening day. He did not participate in discussions with another team of stakers on the Saturday,

saying that he had been instructed to keep his distance, as he was impaired. Mr. Thursten was initially confused as to which activities took place on which of Sunday or Monday, finally deciding that it was Sunday during which he showed everyone how to stake, involving showing everyone what a claim post was, cutting of four posts, what to inscribe and where to put tags. He had each of the group put up what he called "baby claims" and then he inspected them. Also, on Sunday, they got wood for the camp. On the Monday, they prepped the claims and started driving the lines. Only 1219962 and part of 1219963 were prepped.

The inconsistencies in times for the staking of 1219962 were pointed out to Mr. Thursten. He explained that he does not wear a watch, but just relied on his internal clock. He had never made such mistakes before, and put it down to the rush situation. He stated that he had offered to go back and fix it. During the rest of the day, he attempted to complete 1219963, but his helper, Mr. Joly, got lost. In fact, it was Joly who was supposed to be staking this claim, but he never made it to the #2 post, nor did he meet his #4 post and continued going north instead of heading east again to the #1. Mr. Thursten stated that he met up with Joly before noon, put in the #1 post and sent Joly along to the #2 and hoping to meet at the #3 post. Thursten went to the #4, then 3. Mr. Leahy pointed out that staking was required to be a continuous action, to which Mr. Thursten replied that he could help stake as long as Joly erected his own posts and signed them, so he, Mr. Thursten cut the posts and drove the lines. However, when Joly didn't show at the #3, Mr. Thursten did them for him and went to find him, which took the rest of the day. Mr. Thursten was confused as to his activities on the 18th, but finally decided that was when he staked 1219971. He stated that he also took Joly with him to the west to find open ground, but kept running into lines and posts and gave up as it was hopeless. On the last day, he worked on the 1219965, starting at the #4, with Joly as his helper. Someone put in a #1 on the block and left a note that it was there to use. Also, the line from the #3 to the #4 had been done. The #4 was cut and leaned, but not squared. He suggested that someone else drove the line. Even though this claim was staked on the 19th, all the posts indicate the 18th. He agreed that he didn't know what day it was, which was why he offered to inspect. Under cross-examination, Mr. Thursten stated that he has been staking for 23 years, often for Mr. Leahy and would have no reason to sabotage his work.

Ms. Black stated that she was present during Mr. Leahy's conversation with Mr. O'Connor. Her recollection was that Mr. O'Connor gave assurances, due to his experience as an inspector and his knowledge of the **Mining Act**, that the work would be done well. Under cross-examination, she agreed that Mr. Leahy was advised that inexperienced stakers would be used, although she was under the impression that Mr. Thursten was experienced. She had the impression that the others had experience in the bush as line cutters and could handle themselves in the bush.

Mr. Leahy stated that he engaged Mr. O'Connor on September 12th, arranging to meet him at 10 am on the Red Squirrel Road. However, O'Connor and his crew showed up late, around 4:30, and it was apparent both O'Connor and Mr. Thursten had been drinking. He

gave Mr. O'Connor the maps and air photos. On the evening of the 16th, Mr. Leahy went to the camp and was advised that a large number of claims had been prepped, in the neighbourhood of eight to ten, he was led to believe, with the two previous days having been spent prepping. On the 18th at dawn, he was told seven or eight claims had been staked and everything was under control. On the afternoon of the 18th, Mr. Leahy received a call from Messrs. O'Connor and Thursten, who were at a local tavern, and arranged to deliver groceries to them at 7:30 at which time, he had been told about the competition moving into the area around 1219962 and 1219963. He was assured by the men that they would head back to camp after one more beer and organize one more days staking. Mr. Leahy remained apprehensive about the competition. The next morning, Mr. Leahy went in with Ms. Black, Mr. Bonney, Mr. Postima and found O'Connor and Thursten still asleep, apparently having gotten back to camp around 5:30 am. They were shown the map which depicted a large number of claims staked. Mr. Leahy proceeded to stake 1219942, aware that Thursten would be working on the claim to the west. Mr. Leahy anticipated meeting Thursten at the point where their #2 and #3 posts would coincide. By radio he contacted Bonney and Postima and instructed them to run the line from the #4 of 1219942 south towards the #3 and as an aide to Mr. Thursten, cut loose posts for him to use, saving time on his way up.

On the afternoon of the 19th, when they had completed their staking, they heard someone yelling in the vicinity of the 1219971. For some reason, it became apparent to Mr. Leahy that Mr. O'Connor had not been completely honest in relating what had been done and how, and as a result he lost confidence. Mr. Leahy stated that he suspected that the claims might be vulnerable to dispute and wanted to discuss the situation with his partner before taking further action. He had been informed by Barry McCombe, part of the group staking to the south, that he had noticed Joly's name misspelled and that they were considering disputing the claim.

On the basis of his observations of poor blazing and possible dispute, Mr. Leahy ordered an independent inspection on the 23rd of September. On the 25th, he paid \$5,000 to Mr. O'Connor on account. On September 28th, he received the report (Ex. 5, Tab 2) and on the 29th, ordered the restaking. On September 30th, Mr. Leahy went to restake one claim and inspect 1219959 and 1219961. He found that the north boundary of 59 ran along the lakeshore for 200 metres, with but a couple of pieces of tape and several blazes. The north boundary of the 61 was run very peculiarly, with a perfect line west swinging south 45 degrees, poor blazing and once the bottom of the bay had been cleared, swung west beautifully, then swung southwest in a zig zag to the #4 post. On October 1, no witness posts were found for the #3 of 1219965, although there was one witness post on the east shore with no date or time and only had an arrow but no distance. In restaking what became 1202751, Mr. Leahy had opportunity to inspect the east boundaries of 1219962 and 1219963 and found that the lines were flagged only about 100 feet or so, largely unfollowable.

On October 11, 1996, Mr. Leahy sent a letter to Canadian Gems stating that he would not be paying the balance on account, as the claims staked were vulnerable to dispute. On October 30th, Mr. Leahy visited the property with Fred Kiernicki and John North and observed new posts on the north boundary of 1219969 dated September 29th or 30th, but as it was nearly dark, they did not fully inspect. He became suspicious that someone might be trying to overtake at least one of the claims or that new posts were erected by Mr. Thursten, particularly as he received information from a third party that Mr. Thursten and another had been observed erecting posts. Reference was made to Norman Mailey's witness statement, although it was suggested by Mr. Cooper that Maily should have been called in person to give evidence.

Under cross-examination, Mr. Leahy indicated that he rarely made mistakes in staking. He discussed with Mr. Cooper what exactly was required to stake under the **Mining Act**. Mr. Leahy indicated that the work done by Canadian Gems in line cutting had been fine and he was happy to pay for a job well done.

Final Submissions

Mr. Cooper submitted that Mr. O'Connor and his crew did the work that they had been contracted to do. There were mistakes of a minor nature and could be fixed by a Recorder's Order. Subsection 43(2) of the **Mining Act** states that staking will be found to be in substantial compliance if stakers in the vicinity are not likely to be misled. Here we have evidence of the Canadian Gems stakers wishing to stake with no evidence of competition with others for the same claims. There is no evidence that others in the field are likely to be misled by the Canadian Gems stakings. There is no evidence of bad faith, nor of knowingly making false statements in the Applications to Record.

According to the case of **Ramsay and Fernberg**, the cumulative defects doctrine was held originally by the Commissioner to not be cured through substantial compliance. The Court held that substantial compliance is a statutory doctrine which prevails, despite technical deficiencies which were evident. Mr. Leahy is seeking to resurrect the cumulative defects doctrine, to which Mr. Cooper submitted that the substantial compliance doctrine must be found to override.

It was the evidence of Mr. Lehti that he was inexperienced. However, the tribunal should find him to be honest, credible and having answered questions in a forthright manner. While the answers of Mr. Thursten were flippant, it must be recognized that he had 23 years of experience as a staker and he was honest and credible, having admitted his mistakes. He has no axe to grind with Mr. Leahy. There is no evidence of sabotage or conspiracy. In Mr. Thursten's own words, he went down to do a good job for Mike.

Mr. Cooper submitted that it has been proven that Mr. O'Connor fulfilled his contract to the best of his ability and the ability of his crew, despite adverse weather conditions and a staking rush. They did the work in good faith and they should be paid. In spite of Mr. Leahy's suspicions, he hired Canadian Gems and O'Connor to do other work.

. . . . 13

Mr. Leahy submitted that a large part of this case rests on credibility. As the supervisor, safety man and coordinator, it was O'Connor's responsibility to ensure that at least the work had been done reasonably well. In the course of such supervision, he should have been helping the inexperienced stakers to avoid making serious mistakes. Mr. O'Connor stated that he visited Mr. Lehti while staking 1219959, 1219968, 1219969 and 1219970, although Mr. Lehti could only recall seeing him once. Mr. O'Connor stated that three claims were prepped, while Lehti stated that only 68 metres of the south east boundary one of his claims was prepped.

Mr. O'Connor had stated to Mr. Leahy that work in and around 1219962 and 1219963 had been completed, but he later found out that it had been started and not completed.

The inspection report of Mr. O'Connor (Ex. 4) shows the northern boundary of 1219959 as a straight line, whereas two inspections, that of Mr. Leahy and Elk Lake Community Forest show a hop scotching line. For someone with eight years experience to hand in an inspection report which represents the truth in this manner, when compared with relatively inexperienced inspectors, and yet they radically differ, is problematic. The claim by O'Connor that one of his posts was shaved is unfounded.

Mr. Leahy contends that Mr. O'Connor's inspection report seriously erodes his credibility. Also, his evidence was that 1219971 was completed on the 18th, but in cross-examination he said the south boundary was touched up on the 19th, even though Mr. Deane was exhausted and could not stake. Then, one of the posts shows the 19th.

Mr. Thursten stated that he never saw the north common boundary of 1219965, and although he purportedly did the staking on the 19th, Mr. Bonney could not locate a post, which was there some days later. All these facts, in Mr. Leahy's submission, erode the credibility of Mr. O'Connor and he submitted that any statements he made are questionable.

On October 24, 1996, Mr. O'Connor wrote to the tribunal on behalf of Canadian Gems, claiming that the only reason that the claims had been restaked was to get out of paying him. Since the cost of the inspection and restaking exceeds the balance owing on the contract, this hardly seems likely. Also, Mr. O'Connor stated that in his experience in staking rushes, there is no perfectly staked claim. Mr. Leahy countered that in his experience, during staking rushes there is even more care to adhere to the legislative requirements, with every precaution taken, even where inexperienced stakers are involved, to ensure that the staking is above reproach.

There is no signed agreement between Raven Resources and Canadian Gems, notwithstanding the submission of the latter, dated December 9th, 1996. Using the formula of \$200 per claim + \$200 per man per day, along with a total of \$400 for a travel day, it is submitted that at a cost of \$2,400 for September 14 through 16, two mining claims and a small portion of a third were prepped. Over the next three days, a total of 17 hours and 11 minutes were spent staking by four men. If the remaining balance of the contract were divided, this would work out to \$519 per hour. Mr. Leahy submitted that it would be unfair to require Raven Resources to pay this rate for 17 man hours of work. In the normal course of staking, one would expect six hours of staking, which for four men over three days would be 72 hours, or an hourly rate of \$123.

Mr. Leahy summarized the deficiencies, referring to a map (Ex. 7) on which he colour coded bad or false times, bad or missing posts, false times and false dates:

- 1219959 He questioned the boundaries which are not adequate, nor properly represented in the sketch. The times are not believable and leave it open to dispute.
- 1219961 The boundaries and times are out of whack. Part of the lines are no good. The times are not believable, particularly between the #4 and #1 in two minutes on lines that are well blazed but not cleared. The sketch omits the details of the bay, where the actual line on the ground curves around it.
- 1219962 The lines are poorly done. The times are suspicious, where there are two finish times shown, the #3 was tagged in time before the #2. There are false statements concerning helpers. This claim is open to dispute.
- 1219963 The lines are poorly done. The times and dates on 1219963 suggest, in his submission, that it was staked over two days, which is contrary to the legislation. Also, Mr. Thursten admitted to inscribing the posts on behalf of the licensee, opening day, and he wasn't even listed as a helper. The recording does not accurately record the facts.
- 1219965 The south boundary cannot be followed. It was recorded as having been staked on the 19th of September, when all of the posts in the field show the 18th. Times are questionable. There is a missing post, one not properly inscribed with distance or date. The recording shows no helpers, even though the evidence shows there were helpers. Not all of the posts have been located. The posts show that he staked clockwise, yet the evidence is that it was staked counter-clockwise.
- 1219967 The fact that Mr. Lehti who had never staked in his life managed to erect 16 posts on the first day is hard to believe. While this claim was reasonably well staked and there was no direct evidence that there were helpers, Mr. Leahy conjectured that there were indeed helpers.
- 1219968 There are no dates on some of the posts along with some confusion as to the time it took to do the work, which leaves it open to dispute.
- 1219969 The staking of this fraction is, in his submission, barely believable. An inexperienced staker did it in 40 minutes, with O'Connor in the area and yet claiming not to have helped him. Mr. Leahy questions whether this was staked in the manner set out and submitted that it is vulnerable to dispute.

- 1219970 The times for this staking do not make sense, nor were the #3 and #4 posts ever found. The distance shown on the witness post is out of whack. Notwithstanding that it was opening day, Mr. Lehti admitted that he had an unlisted helper who inscribed a post which cannot be located.
- 1219971 This mining claim was allegedly staked on the 18th of September. However, there is evidence that the east boundary was spruced up on the 19th. The Application to Record shows a start time of 11, and the #1 post shows 10:50. The second witness post for the #2 post is missing. The dates on the Application do not match the dates in the bush. The zig zag of the boundary, in his experience, is indicative of two people not meeting at the middle and having to jog, which suggests that there was an undeclared helper.
- 1219972 Mr. Leahy submitted that the times would be believable if the claim were prepped, but it was not, so that it likely does not reflect what happened on the ground.

Of all of the mining claims only 1219967, 1219969 and 1219972 could, in his submission, withstand a dispute. All of the others have serious deficiencies which point to poorly concocted schemes, which he suggests point to an intention to deceive. He submitted that it is no accident that the deficiencies were there. In addition to the deficiencies and the wacky times, it becomes obvious that the crew was hiding something. Only 17 hours of staking are accounted for. This leads Mr. Leahy to believe that the times were concocted, as it is unlikely that this is the only time spent staking. There can be no remedies for such discrepancies.

In Mr. Leahy's opinion, the Canadian Gems staking was fraught with numerous technical errors and notwithstanding the inexperience of the stakers, the tribunal should find that there has been a deliberate contravention of the **Act** with regard to dates, times and use of helpers in land open less than 24 hours. He submitted that Mr. O'Connor seems to be the mastermind. The numerous technical errors constitute bad faith and a deliberate attempt to deceive.

In **Ramsay v. Fernberg**, Commissioner Ferguson upheld the decision of the Mining Recorder to cancel the mining claims, having believed that there was a threshold of errors beyond which the recording could not stand. This was overturned by Divisional Court. In 1989 it was the law that substantial compliance should override cumulative defects such that honest mistakes were allowed. The issue of the threshold is not mentioned in this case.

The Court did note that the substantial compliance doctrine took precedence over the cumulative defects doctrine. However, the Court did note that bad faith and an obvious intent to deceive could not constitute substantial compliance. Mr. Leahy submitted that substantial compliance cannot be used as an escape clause where there are so many inconsistencies, which he submitted would be evidence that the staking was not done in good faith.

Since 1989, the **Mining Act** has been amended to more clearly define substantial compliance, so that it has become a catch-all in Mr. Leahy's description. However, the test in this case is whether Raven Resources should have to pay for the staking. It is, in his submission, not necessary to prove that a dispute of the staking is likely to be successful. However, it is no remedy to promise to correct it with a Recorder's Order, which is only available if there is some good reason for the error, not where there are numerous intentional errors. Also, while waiting for an inspection and order, the claims were vulnerable to dispute and if proved, they would have been cancelled. Mr. Leahy also recommended cancellation of their license.

Based upon the real merits and substantial justice of the case, in Mr. Leahy's submission, it boils down to the fact that value was not received for the work done. Since Canadian Gems did not do the job to Raven's satisfaction, and since the claims were vulnerable, Raven Resources should retain title to them. It should also be awarded its costs of this hearing. Raven has been refused offers of options on the property because of the situation of pending proceedings.

In reply, Mr. Cooper pointed out that Mr. Leahy referred to matters which were not addressed in the evidence. Many of his submissions were simply based upon his opinions. Mr. Cooper expressed amazement at the submissions, which should have been based upon the evidence heard, in which case the reason for every mistake could have been openly explained and refuted in total. Canadian Gems has proven that it has carried out the work in good faith, and is looking for the balance of the money owed on the contract, in the absence of which, it is asking for 60% interest in the Mining Claims.

In addition to the balance of the contract, Canadian Gems is seeking costs associated with the hearing, as follows:

| | |
|--------------------|----------------------|
| \$ 300.90 | inspection expenses |
| \$ 110.64 | photocopying |
| \$ 1,000.00 | wages |
| \$ 3,000.00 | lost revenue |
| \$ 100.00 | administrative costs |
| \$ 600.00 | legal costs |
| <u>\$ 6,371.90</u> | Balance on contract |
| \$11,483.44 | Total |

Mr. Leahy countered with the award he was seeking, namely return of the \$5,000.00, legal fees of \$400.00, his time and expenses of \$2,100.00 for a total of \$7,500.00.

The tribunal asked several questions of the parties. Mr. Leahy responded by submitting that there must be a threshold where the cumulative defects in a staking are found to be fatal. Mr. Cooper countered by insisting that the Court decision is binding, and that there is no evidence to suggest that there was bad faith. It is simply a case where numerous errors were made by inexperienced stakers.

It is also pointed out that the previous decision of the Commissioner in **Ramsay and Fernberg** was overturned by the Divisional Court and that is binding on this tribunal. It unequivocally refutes the cumulative defects doctrine, according to Mr. Cooper. He invited the tribunal to conclude that notwithstanding the errors listed, there is no evidence of bad faith or that stakers on behalf of Canadian Gems knowingly made mistakes. The evidence of the stakers should be found to be credible, with them having admitted their mistakes.

Findings

There is no written contract outlining the agreement between Raven Resources and Canadian Gems, a fact which is not in dispute between the parties. Subsection 58(1) of the **Mining Act** provides an alternative to compliance with the **Statute of Frauds**, where evidence in writing of an agreement prior to staking of claims can be corroborated. The subsection is set out in full:

58. (1) No person is entitled to enforce any claim, right or interest, contracted for or acquired before the staking out, to or in or under any staking out or recording or a mining claim or of any mining lands or mining rights done by another person unless the fact that the first-mentioned person is so entitled is made to appear by a writing signed by the holder of the claim or licensee by whom the staking out or recording was done is corroborated by some other material evidence, and, where a right or interest is so made to appear, the **Statute of Frauds** does not apply.

Similar to the decision of Commissioner Ferguson in **Rosenblatt v. Nabigon et. al.** 6 M.C.C. 375, at page 390, this tribunal finds that there is an oral contract between Raven Resources and Canadian Gems, which is corroborated through the evidence given by Mr. Leahy. It should be noted that the test in this subsection requires corroboration from the person who was not the staker.

This case differs from **Rosenblatt** in that, rather than seeking to enforce an agreement for staking, this is a case where Canadian Gems has staked 22 units, transferred them upon receipt of partial payment and is seeking to enforce the terms of the agreement to obtain the balance owing. Raven Resources availed itself of subsection 48(8) and 48(8.1) by restaking the 22 units, now recorded as the Mining Claims. In the alternative, Canadian Gems is seeking the vesting of a 60 percent interest in the Mining Claims. Raven Resources takes the position that the staking of the 22 units was of such poor quality that it is entitled to repudiate the agreement and have its partial payment returned.

The tribunal finds that the agreement was finalized on September 13, 1996 and the stakers entered the field the following day, September 14, 1996, to set up camp. September 15 and 16 were spent in pre-staking activities. Staking occurred on September 17, 18 and 19. The inspection by Elk Lake Community Forest was ordered on September 23rd, but not finalized until September 26th and received on September 28th. In the meantime, Mr. Leahy met with Mr. O'Connor on September 25th and received the Applications to Record the 22 units in exchange for \$5,000 on account, which were subsequently filed with the Mining Recorder on September 27th.

In the course of considering the quality of the stakings by Canadian Gems, the question arises as to how each of the parties wishes to have the agreement treated, according to the law of contract. The position of Raven Resources is that it is entitled to be excused from the agreement by reason of the quality of Canadian Gems' stakings, which is referred to in law in a number of ways, such as a breach going to the root of the contract, a covenant which goes to the whole of the consideration, a condition or a condition precedent, all of which can be regarded as termination, renunciation or repudiation of the agreement. Canadian Gems is of the position that it fulfilled the terms of the agreement adequately and any deficiencies could have been rectified through an inspection and obtaining a Recorder's Order. Through no fault of its own, it was not permitted to do so. Therefore, it is entitled to the balance owing.

The bulk of the evidence and submissions focus on the quality of the stakings, the suggestion being that, any findings concerning whether the stakings substantially comply with the legislation or are deemed to substantially comply would be sufficient to determine whether the terms of the contract had been adequately complied with. The tribunal proceeded at the hearing to accept this approach. It should be noted, however, that the detail and extent of evidence heard on each particular unit staking, along with the inspection evidence, was less detailed than what would have been considered in a dispute pursuant to section 48. In fact, the second inspection witness from Elk Lake Community Forest was not heard thereby causing the situation whereby the Canadian Gems crew present, could not offer explanations for all the deficiencies raised by Mr. Leahy in his submissions.

The tribunal finds that the agreement between the parties is for payment in the bush of a crew of five at \$200 a day each, with \$400 total for the day setting up camp, for a total of \$5,400, plus \$200 per unit staked for 22 units, being \$4,400, for a grand total of \$9,800 before GST. There are incidental costs associated with the agreement, that of an All Terrain Vehicle, \$505.55, food \$282.85 and GST of \$784.00, with the total coming to \$11,371.90.

The tribunal finds that agreement contemplates that the quality of the stakings should on the whole meet the requirements of section 43 of the **Mining Act**. To determine generally whether the stakings do comply, it will be necessary to consider whether the stakings substantially comply with the legislation or can be deemed to substantially comply, withstand the tests set out in section 43.

The tribunal finds that Raven Resources was aware, at the time of the making of the agreement, that the Canadian Gems team would not be made up of experienced stakers, with the exception of Mr. Thursten. Therefore, it was reasonable for Raven Resources to expect stakings which were not necessarily perfect, but that nonetheless could live up to scrutiny when legislative requirements were considered. In this regard, Raven Resources could reasonably expect that, although most of the stakers were novices, they would receive the kind of tutoring, instructions and supervision in the field at the time of staking to ensure that the stakings were as good as possible.

From the outset of hearing evidence of Mr. O'Connor and stakers on behalf of Canadian Gems, the issue of quality of staking was made to appear secondary. The overriding theme throughout was that each staker was doing the best that he could, but the saving grace was to be the inspection by Mr. O'Connor and Recorder's Order pursuant to subsection 110(6) to fix errors.

Very little evidence was given by Mr. O'Connor on the specific steps taken with each staker on a particular claim, to assist in ensuring that the legislative requirements were complied with. Rather, the tribunal heard broad generalities, first, that Mr. O'Connor's primary concern was that of ensuring safety. However, he also presented himself as coordinator of staking, but the tribunal finds that there was little evidence of this. He described his spending time running from staker to staker across units rather than along claim lines, of trying to locate those lost. Mr. O'Connor could not answer many of the questions put to him, saying that he didn't know, as he was not present at the moment in question. Mr. O'Connor did not take notes of his activities, but simply stated that he covered a lot of ground in one day and was concerned about his men. One matter of concern to the tribunal, which clearly contravenes the **Act**, was Mr. O'Connor's evidence that Mr. Deane's blazes were not up to standard and he sent him back into the field on a subsequent day to touch up his line.

The tribunal finds that no satisfactory evidence was given as to Mr. O'Connor's activities in the bush. While his presence was given as staking coordinator, no explanation for why he did not offer assistance to his stakers, by way of a helper, was given. Nor is there any explanation, if Mr. Dean was exhausted, Mr. Joly tagged along with Mr. Thursten and Mr. Lehti was hurt, as to why Mr. O'Connor didn't pick up an axe and do some quality staking himself. There is clearly more to this situation that was presented by the evidence. Overall, the tribunal finds that Mr. O'Connor failed in supervising sufficiently inexperienced stakers in the field to ensure that unnecessary errors would be prevented.

The work of Mr. Thursten is problematic. He was described as a seasoned staker and the tribunal notes that he took visible pride in having never had a staking disputed. Yet, Mr. Thursten allowed himself to go into the bush during this staking rush without a watch. In fact, he admitted to never wearing a watch. While this fact would be worrisome under competitive staking conditions, it defies logic to understand how Mr. Thursten could guarantee his times under any staking conditions without being able to know exactly what time it was. In addition, he apparently became so addled in the field that he was unable to make the times he selected, which the tribunal finds he genuinely believed to be true, appear sequentially on his posts. This type of attitude prevents the making of accurate statements in recording documents. It is beyond comprehension how Mr. Thursten failed to consider that he might be in contravention of subsection 164(2) of the Act and liable to pay a fine. A further problem with Mr. Thursten's efforts is his completion of Mr. Joly's staking of 1219963. It suffices to say that this was improper in the extreme, being contrary to O.Reg. 7/96, ss. 10(2), clause 2. The fact that Mr. Thursten misspelled Mr. Joly's name is evidence that he elected to handle this unfortunate situation in this improper manner demonstrates a lack of good judgement on his part.

Although Mr. Leahy questioned the time it took, Mr. Deane's staking of the fraction 1219969 on opening day appears to have been substantially in compliance with the requirements of the legislation. No actual evidence of a helper was introduced and speculation is unacceptable. On 1219972, there is a missing witness post. On 1219971 the blazing along the north boundary has an unexplained jog, which as Mr. Leahy suggests, indicates that two blazers moving in opposite directions have met up, moving diagonally near their meeting point to ensure that their lines converge. The tribunal does not have the benefit of Mr. Deane's evidence to assist in determining what took place in the field.

As a prepped claim, Mr. Lehti stated that 1219959 took 25 minutes to stake, which Mr. Leahy challenged as being unbelievable. Notwithstanding the northern boundary, which runs along land south of where it should to meet up with the #1, then runs along the lake shore, the tribunal finds Mr. Lehti's evidence to be credible and will accept the times as shown. Again, there is no actual evidence of assistance. On 1219968, the #2 post has no date, the time found on inspection of the #3 post doesn't make sense, being 9:10, when the staking commenced at 10:05, and one of the witness posts is missing a tag. Nonetheless, the tribunal finds that this staking took place more or less in the manner and within the start and finish times set out by Mr. Lehti. On 1219967, Mr. Lehti's evidence is that he blazed moving from the #2 post to #1 post before commencing staking at the #1, which is in contravention of the legislation (O.Reg. 7/96, ss. 8(1), (4), 10(2)). Mr. Leahy questioned the times, but otherwise admitted that he had no direct evidence of helpers on this staking. Mr. Lehti hurt himself during the staking of 1219970, between the #2 and #3 posts, and admitted in his evidence that Mr. Deane, who was tagging along, ended up erecting and inscribing the witness post for the #4, which bears neither name of the licensee nor time. This activity is in contravention of clause 2 of ss 10(2) of O.Reg. 6/96. Also, the #3 post was not located in the field.

Mr. Joly's staking of 1219961 on opening day, was performed in 21 minutes, notwithstanding that it had not been prepped. The north boundary of this claim has a serious directional problem, and more closely resembles steps, moving from the #4 to #1 posts. Joly's staking of 1219963, which was completed by Thursten, is commented on above.

The tribunal can make several observations concerning these stakings. The group comprised primarily of staking amateurs were an uneven bunch. Mr. Lehti, up until the time of his injury, was the unknown treasure of the group, clearly setting off staking in a seemingly competent manner, largely paying attention to whatever instructions he had been given. It is unfortunate that the two other amateurs did not prove to be as comfortable and able in the bush. Mr. Thursten's work must be discounted in its entirety, owing to his reliance on his internal clock. However, it should be stated that the tribunal does not doubt the sincerity of Mr. Thursten's evidence, particularly concerning the existence of helicopters, dead end lines and the like.

The staking effort, which was plagued by some inexperience and general unsuitability to life in the bush by at least one of the stakers, also appears to have been afflicted by other matters. There were veiled references throughout the hearing on the amount of drinking which took place, although there was no evidence of drinking during the staking itself. Nonetheless, questions of impairment or being hung over remain and may have contributed to the overall quality and quantity of work. Finally, in completing the Applications to Record for signature by the various stakers, Mr. O'Connor did not pay sufficient attention to what may have been going on in the bush so that it could accurately be reflected in these documents, particularly with regard to helpers. The tribunal finds that the stakers themselves did not deliberately mislead in giving information to Mr. O'Connor for preparing the Applications, but rather were relying completely on Mr. O'Connor to know what information should have been elicited to ensure accuracy. Mr. O'Connor undertook this responsibility in a hasty manner, evidenced by the identical maps in the staking sketches denoting photocopies, upon which the particulars of the various units were drawn. With respect to the Applications to Record, the tribunal finds Mr. O'Connor failed to exercise good judgement in his supervision of the staking enterprise at this stage.

Notwithstanding that the detail necessary for hearing a dispute was not entertained at the hearing, of all of the stakings 1219969 is found to substantially comply with the legislative requirements within the meaning of subsection 43(1).

The tribunal will consider whether the remaining claims can be found to be deemed to be in substantial compliance within the meaning of subsection 43(2). The wording of subsection 43(2) is positive, in the sense that deemed substantial compliance is available where the staking deficiencies are not likely to be misleading and where performed in good faith. The test, particularly the second, is suggestive of dark motives on the part of stakers for a staking to be defeated. This is unfortunate, as it may lead to allegations that staking was undertaken in a deliberately unsatisfactory manner.

The tribunal finds that nothing in the wording of subsection 43(2) contemplates the resurrection of the cumulative defects doctrine, which was struck by the Divisional Court in **Ramsay and Fernberg** in favour of the statutory doctrine of substantial compliance. What has changed since that case is the addition of subsection 43(2), which provides for deeming of substantial compliance in certain circumstances. However, the test of good faith will be examined.

The tribunal finds that the bulk of the stakings of the 22 units by the Canadian Gems stakers are far from competent, and steps taken to save them only add to the problems encountered, such as touching up lines after staking and problems in the Applications to Record. Mr. Thursten's completion of Mr. Joly's 1219963 is clearly deliberate, but again, the motive behind it appears to have been misguided and in poor judgement, rather than setting out intentionally to stake a unit which would not withstand scrutiny.

The tribunal finds that on the whole, the evidence heard is not of premeditated deceit, but rather of incompetence and after-the-fact cover-ups. Mr. O'Connor admitted that errors were made. Mr. Lehti probably would not have known the errors which he made, as he was less than well informed generally about legislative requirements. Although Messrs Deane and Joly were not called as witnesses, on the basis of the evidence presented, it would appear that they were even less familiar with what was required than Mr. Lehti.

Notwithstanding the allegations of deceit and schemes being concocted, the tribunal finds that there has been no pre-meditated intention to mislead or sabotage the staking on the part of Mr. O'Connor and the Canadian Gems stakers at the time the staking was taking place. However, taken as a whole, the tribunal finds that the quality of staking was careless and perhaps even wanton. This was further compounded with whatever efforts were made to rectify errors without the requisite Recorder's Order. The tribunal finds that, based upon the evidence of Mr. O'Connor which was repeated throughout, and echoed by others, that the team commenced staking on opening day without being adequately knowledgeable and prepared to adequately stake to the best of their abilities as the circumstances of the moment would permit in accordance with the legislation. Rather, they staked with the attitude that no matter how deficient the staking, while their hearts were in it and they wanted to do well, anything that wasn't satisfactory could be readily rectified by a Recorder's Order. This behaviour is neither pre-meditated nor intentional in its disregard of staking requirements, but neither does it contain

the kind of requisite state of mind prepared to do the best possible job which is contemplated by subsection 43(2). It smacks of a false sense of security in the curative powers of the Recorder's Order, which at no time can be considered a certainty. Stakers should not be proceeding in the field in this manner and under these assumptions.

The issue of what constitutes good faith has been extensively considered in Canada in criminal cases involving police actions, in relation to several sections of the **Charter of Rights and Freedoms**, (**R. v. Genest** (1989), 37 S.C.R. 252 [S.C.C.]; **R. v. Kokesch** (1990), 3 S.C.R. 3 [S.C.C.]). There has been considerable discussion in subsequent cases as to whether the absence of good faith must necessarily mean bad faith. In the context of clause 43(2)(b) of the **Mining Act**, the tribunal finds that it will rely on the finding of the Court in interpreting the phrase "good faith" as used in the **Family Law Act, 1986**, S.O. 1986, c. 4 in **Re Harris and Godkewitsch** (1983), 41 O.R. (2d) 779 (Prov. Ct.), decided under the **Family Law Reform Act**, R.S.O. 1980, c. 152, where Nasmith Prov. J. states at page 781:

..."good faith" as used in s. 1(f)(iii) must be taken in the sense of "intention to comply with Ontario law".

The tribunal finds that claims 1219959, 1219961, 1219968 and 1219972 were staked in a manner which the tribunal finds meets the test in clause 43(2)(b), having been carried out with some measure of good faith, albeit in ignorance. The staking of 1219967 involves blazing counterclockwise before staking was commenced, which is found to have been done in complete ignorance but nevertheless, carried out in good faith. There is strong evidence which has not been refuted that undeclared helpers assisted with blazing on 1219971. While it is unclear whether fault can be attributed to the staker, Mr. Deane, or to Mr. O'Connor for failing to ask the question when completing the Application to Record for Mr. Deane's signature, the tribunal is prepared to give Mr. Deane the benefit of the doubt. The remainder of the stakings are problematic. Under a dispute situation, the tribunal would have directed the Mining Recorder to issue an order pursuant to clauses 110(6)(a), (b) and (c), as applicable, to rectify deficiencies.

It should be noted that the Mining Recorder's powers under subsection 110(6) are discretionary, where the phrase "**may** make an order" is used. Therefore, it is pointed out that it is problematic to proceed to stake in a manner that is anything less than exemplary, on the assumption that such an order will necessarily always be granted. As far as Mining Recorder's Orders pursuant to subsection 110(6) are concerned, the tribunal finds that requirement for such Orders may have been contemplated by the agreement, but only minimally. Such Orders cannot be used as the basis to accept less than minimal staking requirements on the majority of the units.

The tribunal finds that to undertake a staking with novice or even experienced stakers who believe that all deficiencies can be rectified, no matter what goes wrong and however many requirements have not been complied with, does not constitute "an attempt ... made in good faith". The tribunal will consider the remaining claims.

1219962 and 1219965 would be disallowed, due to the fact that Mr. Thursten did not wear a watch, the latter of which has further problems on the north boundary generally. The completion of 1219963 by a second undeclared licensee failing to exercise good judgement will not be found to be deemed in substantial compliance. 1219970 was completed by a second licensee on opening day, owing to the injury of Mr. Lehti and should have been abandoned by Mr. Lehti and restaked by another member of the team. In fact, there is no evidence that the staking was completed, as posts and lines were missing.

Therefore, of 22 units staked, the tribunal has found that 12 units can be brought within the tests set out under section 43 for substantial or deemed substantial compliance. The remainder are found to have been done in a manner so ill informed or so carelessly or without the requisite good judgement that one cannot imagine their being saved by any means available under the legislation.

Terms of the Contract

Mr. Leahy takes the position that Raven Resources received nothing of value in the staking by Canadian Gems. The tribunal does not concur. Even though he quite correctly undertook to restake the 22 units, nonetheless, they were staked out on the ground and recorded. This fact gave Mr. Leahy something of value in that he was able to lay claim to ground on and just after opening day which would otherwise undoubtedly have been staked by competitors. Even though he was concerned, and 1219963 was visibly vulnerable, having the licensee's name incorrectly inscribed, the remaining units bore markings in the field which were in fact not readily challenged by stakers in the vicinity. The tribunal finds that this benefit received by Raven Resources has some monetary value. Therefore, the tribunal finds that Raven Resources is not entitled to a refund of the \$5,000.00 paid on account.

On the other hand, the terms of the contract were quite generous, given that several members of the crew did not actually stake for the full three days. Also, the tribunal finds that the parties had different things in mind as to the purpose of the two full days in the bush prior to staking. Mr. Leahy assumed that this time would primarily be used for preparation of claims, whereas Mr. O'Connor assumed that it would be used for training. Under the circumstances, given the poor quality of the stakings and the relatively unskilled level of the crew post-training, the tribunal finds that Canadian Gems will be awarded a portion of the agreement price.

The basis for this decision is that 12 of the 22 units have been found to substantially comply or more importantly, could be eligible for a Recorder's Order, in which case additional work would have been required. The total allowed for these units is found to be \$2,400.00.

The value claimed for men days in the bush totals \$5,400. Of this, the tribunal finds that the full day set up, for \$400 was not received, as the crew arrived at 4:30 p.m. instead of 10:00 a.m., so that this amount will be discounted by \$200. During the two days prior to opening day, for which Raven Resources was being asked to pay \$1,000 per day, the bulk of

the activity centered around training of the three inexperienced stakers. The tribunal finds that this expense must be born equally by Raven Resources and Canadian Gems, so that \$1,000 will be allowed. Of the three days staking in the field, only one day's staking was performed by Mr. Lehti, who could have returned to town on the 18th with Messrs. O'Connor and Thursten, so that his last two days are of little or no staking value to the agreement. The last day will be disallowed and \$400 will be allowed. Mr. Deane staked for two days, so his last day will be disallowed, so that \$400 will be allowed. Mr. Joly only really performed on one day, and his assistance to Mr. Thursten, which ended up of little value, will be allowed for one of the two days, for \$200. Messrs. O'Connor and Thursten will be allowed one half of the agreed upon price for their efforts, for a total of \$300 each. A total of \$2,600 will be allowed. Charges for the all terrain vehicle of \$505.55 and the food and provisions of \$282.85 are allowed. GST is calculated on the total excepting the provisions, in the amount of \$385.39.

The tribunal finds that it will allow \$6,173.79 to Canadian Gems for value received on the agreement. From this, the payment on account of \$5,000.00 is deducted for a total owing of \$1,173.79.

The basis for these findings is that Raven Resources cannot be allowed to rely on contract principles of fundamental breach or its equivalent. At the time when the transfers were signed, Canadian Gems was not alerted to the concerns which Raven Resources had regarding the staking. Had Mr. O'Connor been aware, he might not have been so ready to sign over the claims. Raven Resources cannot be allowed to benefit from this situation of its own creation. Moreover, Raven Resources received a benefit, of being the recorded holder on the 22 units until such time as they were restaked, which constitutes notice to other stakers in the field that the land is not open for staking (s. 27(c)), except in a situation where a staker intends to dispute. On the facts as presented, two claims would be clearly vulnerable to dispute to those in the field performing reconnaissance, those being the claim completed by Mr. Thursten, misspelling Joly's name, and the claim by Mr. Thursten showing non-sequential times at corner posts.

The issue of Raven Resources not being allowed to claim a fundamental breach of the agreement may also affect its position to avail itself of subsection 48(8), being "a transferee who has acquired the claim in good faith", while not discussed with the parties. Any attempt to back out of the agreement, due to its alleged breach, would prevent Raven Resources from the benefit of this subsection. Effectively, that would mean it acquired title to these claims as of the dates of the original stakings, without meeting the prerequisite in the subsection which gives rise to the right.

Notwithstanding that the tribunal has allowed partial payment of the agreement price to Canadian Gems, it finds that the circumstances warrant allowing Raven Resources its costs fixed at \$1,500.00. This finding is based upon the fact that Raven Resources received far less than it bargained for, in terms of quality staking and in terms of the number of claims staked. The Canadian Gems stakers were ideally situated to stake far more units than they ultimately accomplished. This was due largely to their own poor conduct as a team, and the failure of the person at the helm, Mr. O'Connor, to be in control of the staking.

The amount owed on account of costs will be set off against the amount owing on the agreement, with the result that Canadian Gems will owe Raven Resources \$326.21.

As far as a declaration vesting a 60 percent interest in the Mining Claims in Canadian Gems, by virtue of the forgoing findings, any interest that Canadian Gems has in the Mining Claims ceases. It has received all that it is entitled to under the agreement, as carried out by its stakers, in that the value of the agreement of \$6,173.79, with \$5,000.00 received on account and the balance set off against the costs of Raven Resources, will result in a net amount of \$326.21 owing by Canadian Gems.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which the Mining Claims were pending before the tribunal, being October 24, 1996 to July 14, 1997, a total of 264 days, will be excluded in computing time within which work upon the Mining Claims is to be performed.

Pursuant to subsection 67(3) of the **Act**, June 18, 1999 is deemed to be the date for the filing of the first two units of prescribed assessment work on the Mining Claims. Pursuant to subsection 67(4) of the **Act**, all subsequent anniversary dates are deemed to be June 18.

Conclusions

The application of Canadian Gems and Minerals Inc. will be allowed in part with costs incurred in the amount of \$1,500.00 to be paid to the respondent, Raven Resources Inc.

The amount owing by the applicant is to be set off against the amount owing by the respondent with the result being that the applicant is ordered to pay the respondent \$326.21 within 30 days of the making of this Order.

All interest of the applicant in the Mining Claims hereby ceases.

The time during which this application was pending before the tribunal will be excluded for purposes of determining when the first and second units of prescribed assessment work must be performed and filed.